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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY ROSE,

Defendant and Appellant.

B286558

(Los Angeles County
Super. Ct. No. BA449850)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed in part, remanded in part.

G. Martin Velez for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, appellant was convicted of possession for sale of phencyclidine (PCP) (Health & Saf. Code, § 11378.5). In a bifurcated trial, the jury also found true appellant's five prior convictions (Pen. Code, § 667.5, subd. (b)),¹ one prior strike (§ 667, subd. (d)/ § 1170.12, subd. (b)), and a controlled substance offense involving a minor (Health & Saf. Code, § 11370.2, subd. (b)).

Appellant was sentenced to a prison term of 12 years, consisting of a four-year midterm for possession for sale of PCP, doubled for the prior strike, and four years for each of four prior prison term enhancements. The trial court struck the remaining prior prison term enhancement, as well as the allegation that appellant previously committed a controlled substance offense involving a minor.

Appellant brings this appeal on grounds the trial court erred by failing to provide a unanimity instruction on the possession for sale charge, and by improperly referencing punishment during instructions on the prior convictions trial. Appellant also contends remand is necessary for the trial court to strike his prior prison term enhancements for offenses later reclassified as misdemeanors under Proposition 47. We agree remand is necessary for this limited purpose. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Case in Chief*

Los Angeles Police Department (LAPD) Officers Timothy Jang and Samantha Shannon and criminologist Wubayehu Tsega testified in the prosecution's case in chief. Officers Jang and Shannon had experience and training in narcotics sales and, specifically, in the sale of phencyclidine (PCP).

Officer Jang testified that on September 1, 2016, around 11:00 p.m., he and fellow officer Miguel Reynoso were patrolling near the intersection of Western and Jefferson Avenues in Los Angeles. Jang drove past a Food 4 Less and saw two cars – a Nissan Altima and a Cadillac Escalade – parked

¹ All further unspecified references are to the Penal Code.

one space apart from each other at the farthest end of the parking lot. The cars drew Jang's attention because they were the only ones parked at such a distance from the supermarket. Jang saw a male standing by the driver's side of the Escalade and saw appellant in the driver's seat. As he drove by the car, Jang was approximately 10 yards (or 30 feet) away, and had a clear view of the car; the parking lot was well lit. Jang observed the male conduct a hand-to-hand transaction with appellant just outside the driver's side window of the Escalade. He illustrated for the jury two hands coming together and apart, as if grasping something. Less than three or four seconds later, Jang observed appellant conduct another hand-to-hand transaction with the passenger in the Escalade, later identified as Shavonnie Mapps. Jang did not see an object being passed during the transactions. The two transactions occurred "in one continuous movement."

The officers drove into the parking lot and pulled up behind the cars. Jang observed the male outside the Escalade, later identified as Derrick Modica, walk to the passenger side of the Altima and place an object into his left pant pocket. Jang detained Modica and searched him. He found in Modica's left pant pocket a small glass medicine bottle containing a brown liquid resembling PCP. Jang estimated the vial contained an ounce of liquid, and he opined the wholesale street value of that amount of PCP would be \$300 to \$500. Additional officers arrived at the scene, including Shannon, who searched Mapps. In Mapps' bra, Shannon found two bottles containing what appeared to be PCP. The larger of the two bottles looked exactly like the bottle found on Modica, and contained the same amount of brown liquid, an amount common for sale. Jang searched the Escalade and found loose cash on the front passenger seat in multiple denominations, a common practice among drug dealers.

Appellant also was searched; no drugs were found on him. Jang explained that in a drug transaction, it is common for females to hold the drugs because they are less likely to be searched by male officers, and have more hiding places within their bodies. A female's bra is a common hiding place for narcotics. Appellant and Mapps were arrested. Modica was not arrested due to his serious medical issues, but he was included in the police report to be investigated at a later time. Testing conducted on the vial found

on Modica and the larger vial found on Mapps confirmed they contained PCP in usable amounts.

B. *Defense Case*

Shavonnie Mapps was the only defense witness. At the time of trial, she was appellant's fiancée and they lived together in an apartment in Compton. She had met Modica through appellant, and Modica had been renting a room from her for four months. Mapps testified she and appellant went to the Food 4 Less to collect rent money from Modica. Modica paid \$300 rent per month. Modica had not been home for a few days, and had asked her to meet him at Food 4 Less. Mapps told appellant where to park, away from other cars, so that Modica would clearly see them. She intended to go grocery shopping at the Food 4 Less after meeting Modica.

After Modica arrived, he got out of his car and walked over to the passenger side of the Escalade to give Mapps the rent money, then walked to the driver's side and talked to appellant. Modica gave her only \$100, because he had given her \$200 at home the week before. She put the rent money Modica gave her in her bra, which also contained an additional \$197 of her own money. When the police arrived and searched them, according to Mapps, there was no money on the front passenger seat of the Escalade.

Following her arrest, Mapps pled guilty to the charge of possession of a controlled substance for sale. She provided a written statement claiming full responsibility for her actions and indicating appellant had no involvement. At trial, Mapps testified she had told the police she possessed the drugs for personal use, and had never represented the drugs were appellant's. Mapps testified she possessed two vials of PCP in her bra, but did not tell appellant about the PCP. Mapps had regularly used PCP for many years to alleviate pain from a gunshot wound, and the PCP she used had always been packaged in small glass bottles. Mapps did not see appellant hand anything to Modica, nor did she see Modica hand anything to appellant. Mapps denied exchanging anything with appellant in the car.

C. *Prosecution Rebuttal*

LAPD Officer Reynoso, who was on duty with Jang on the night of the incident, testified on rebuttal. He confirmed seeing a hand-to-hand exchange between appellant and Modica, followed immediately by an exchange

between appellant and Mapps. He further confirmed that money was found on the front passenger seat of the Escalade. According to Reynoso, when Mapps was questioned at the police station following her arrest, she appeared visibly nervous and said the drugs were appellant's. Based on his experience and training, Reynoso opined that the larger bottles of PCP found on Mapps and Modica were for sale, because PCP is ingested by dipping a cigarette and smoking it, and "you can't get one of these bottles and take a shot." It would be unusual to possess such a large amount of bottled PCP for personal use, because PCP is generally used in cigarette form.

D. *Closing Arguments*

Relying on the strength of the circumstantial evidence, the prosecution argued that appellant was guilty of the crime of possession of PCP with the intent to sell, using Mapps to hold the drugs and act as a cover. The prosecutor argued that all six elements of the charge of possession of PCP for sale were easily established: (1) appellant possessed a controlled substance – he exercised control over the PCP bottles found on Modica and Mapps; (2) he knew of the presence of the controlled substance; (3) he knew of the nature or character of the controlled substance; (4) when he possessed the controlled substance, he intended to sell it or that someone else sell it; (5) the controlled substance was PCP; and (6) it was in a usable amount. The prosecutor also challenged Mapps' credibility, noting that as appellant's fiancée, she had a strong motive to lie to protect him. The prosecutor emphasized that Mapps' testimony that the PCP was for her personal use contradicted her own plea of guilty to a charge of possession for sale.

Defense counsel argued the prosecution had not met its burden of proving guilt beyond a reasonable doubt because the case rested on "speculation, suspicion, and innuendo." He emphasized that none of the police officers had observed any object being passed during the hand-to-hand transactions.

E. *Verdict and Bifurcated Trial on Prior Convictions*

The jury found appellant guilty of the crime of possession for sale of a controlled substance.

Following the verdict, the next phase of the trial on appellant's prior convictions was held. Belinda Herrera, senior paralegal for the Los Angeles

County District Attorney's Office, testified for the prosecution. She testified based on appellant's prison packet, which contained a chronological history of appellant's movements while in custody and an abstract of judgments. Appellant had five prior convictions (collectively, the "first" "second" "third" "fourth" and "fifth" priors): (1) in September 1997, he was convicted of possessing a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in case No. TA037720, and sentenced to two years; (2) in February 2002, he was convicted of second degree robbery (§ 211) and sentenced to two years; (3) in November 2006, he was convicted of possessing cocaine base for sale (Health & Saf. Code, § 11351.5) and sentenced to three years; (4) in August 2010, he was convicted of resisting an executive officer (§ 69) and sentenced to three years, but was discharged from prison in October 2011; and (5) in April 2013, he was convicted of petty theft with a prior (§ 666) in case No. BA403420 and sentenced to two years. Based on the documents, Herrera explained that appellant had not remained free from prison custody for more than five years from the time of his first conviction in 1997.²

Prior to closing arguments, the trial court instructed the jury: "In deciding whether the People have proved the allegations, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of trial." After argument, the trial court further instructed the jury:

"I'm going to remind you of one thing. And that is your obligation . . . to make findings without consideration of punishment. A challenging request for me to make, but the law requires it, when you know that the reason that you're being asked to make these findings is to give options to me, and the prosecutor to argue for a different sentence than if you only

² Herrera was initially unable to determine, without appellant's rap sheet in front of her, whether appellant was in prison custody after his 2011 discharge. However, on redirect examination, she identified a document showing appellant had been granted probation on his fifth prior, and sent to prison in October 2013 for violating his probation. Thus, appellant had not remained free from prison custody for more than five years even after his discharge in 2011.

convicted on the underlying charge. Nonetheless, your job is to find are these true or not, without consideration of punishment.

“To the extent that you might wonder because of the number of convictions does this trigger what is known as the three strikes law, the answer to that is no, it does not. Neither the main offense in this trial would justify the three strikes law being imposed, nor the convictions being presented to you.

“So you’re not supposed to think about that anyway, but if you were going to have trouble worrying about that, you don’t have to worry about that, your findings would not trigger that. But you should still make your findings based on the evidence, not based on what you think it’s going to do to my options or to Mr. Rose.”

Defense counsel did not object. The jury found true the five prior convictions.

F. *Sentencing*

Appellant was sentenced to a prison term of 12 years, consisting of a four-year midterm for possession for sale of PCP, doubled for the prior strike, and four years for each of four prior prison term enhancements. The trial court struck the remaining prison prior as well as the allegation that appellant previously committed a controlled substance offense involving a minor. The trial court did not specify which prior prison term enhancement was stricken. Appellant timely appealed.

After sentencing, appellant filed petitions to reduce his convictions for possession of a controlled substance in case No. TA037720 (the “first” prior) and petty theft with a prior in case No. BA403420 (the “fifth” prior) to misdemeanors pursuant to Proposition 47. In April and June 2018, the trial court granted the petitions. The prior convictions had each served as the basis for a prior prison term enhancement in the current case.

DISCUSSION

A. The Trial Court Had No Sua Sponte Duty To Issue A Unanimity Instruction.

Appellant argues the trial court erred by not instructing the jury that it must unanimously agree whether the PCP found on Modica or Mapps

supported the crime of possession for purposes of sale. An appellate court reviews the request for a unanimity instruction de novo. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 73.)

1. There Was One Continuous Act of Possession.

- a. *Governing Principles*

“In a criminal case, a jury verdict must be unanimous. [Citations.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*)). In addition, the jury must agree unanimously the defendant is guilty of a specific crime. (*Ibid.*) “[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]” (*Ibid.*) Where no election is made, the court has a sua sponte duty to instruct on the unanimity requirement. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) “The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.” (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.)

“A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citation.] A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.” (*People v. Maury* (2003) 30 Cal.4th 342, 422-423 (*Maury*)). However, “[w]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the [unanimity] instruction is not necessary to the jury’s understanding of the case.” [Citations.]” (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.)

“[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant’s precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby the defendant is guilty. [Citation.]” (*Russo, supra*, 25 Cal.4th at p. 1132.) “In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any

particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*Id.* at p. 1135.)

In the context of possessory drug offenses, a unanimity instruction is required when (1) “actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space”; (2) “there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant”; and (3) the People have not elected to rely on only one of the individual units. (*People v. King* (1991) 231 Cal.App.3d 493, 501(*King*); see also *id.* at pp. 501-502.) A unanimity instruction is not required, however, if the evidence shows multiple acts closely connected in a continuous course of conduct. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198.) “Possessory drug offenses are continuing crimes that extend throughout a defendant’s assertion of dominion and control over the drugs, even when the drugs are not in the defendant’s immediate physical presence.” (*People v. Bland* (1995) 10 Cal.4th 991, 995.) “Drug possession is indeed a ‘continuing’ offense, one that extends through time. Thus, throughout the entire time the defendant asserts dominion and control over illegal drugs, the defendant is criminally liable for the drug possession. [Citations.]” (*Id.* at p. 999.) The continuous conduct exception applies only “‘where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the . . . testimony in toto.’ [Citations.]”” (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1011.)

b. *Analysis*

The evidence suggests appellant committed a single, continuous act of possession for purposes of sale involving two units of PCP closely related in time and space. The LAPD officers observed two hand-to-hand transactions occurring in quick succession, within three or four seconds of each other and “in one continuous movement.” Appellant was at the center of both transactions, and the LAPD officers observed his hand coming into contact with Modica’s hand outside the car window, as if grasping or exchanging

something. Appellant's hand then came into contact with Mapps' hand inside the car, as if grasping or exchanging something. Modica was observed putting something into his left pant pocket as he walked away from the Escalade back to his car. The PCP bottle found in Modica's pocket was identical to the PCP bottle found in Mapps' bra, and contained the same amount of PCP, which was too large for personal use. Jang testified that it is a common practice for drug dealers to use a female companion to conceal drugs in their body. The amount of cash Mapps admitted possessing was consistent with the street value of the PCP found on Modica. Lastly, when interrogated at the police station following her arrest, Mapps admitted the drugs were appellant's. The various chains of evidence led to the logical conclusion that appellant continuously possessed or exercised control over both bottles of PCP found on Modica and Mapps.

The two units of PCP were not reasonably distinguishable by a separation in time and space. Appellant relies on *King* to argue that there was no continuous course of conduct because the PCP bottles were found in different locations. In *King*, a search yielded PCP in two different locations within the defendant's home – in a purse found in the living room, and in a decorative statue in the kitchen. (*King, supra*, 231 Cal.App.3d at p. 497.) The evidence showed that the purse belonged to another woman, and defendant's boyfriend claimed ownership of the PCP found in the statue. (*Id.* at pp. 497-498.) The court in *King* concluded that a unanimity instruction was required because the two units of PCP were reasonably distinguishable by a separation in space, and there was evidence as to each unit from which a reasonable jury could find that it was solely possessed or controlled by a person other than the defendant. (*Id.* at pp. 500-502.) In contrast, there was no separation of space here. The two bottles of PCP originated from appellant's car and were not fragmented in space, even if Modica's bottle was found in his pocket after he had returned to his car. (See *People v. Wright* (1968) 268 Cal.App.2d 196, 198 [no unanimity instruction required where marijuana joints were found in car defendant occupied, and also on cliff where defendant's friend threw the joints as police search began; "evidence showed all of the marijuana came from the car" and defendant knew of its presence].)

Appellant also relies on *People v. Crawford* (1982) 131 Cal.App.3d 591 (*Crawford*) to establish a separation in space. In *Crawford*, the defendant's conviction for possession of a firearm by an ex-felon was based on four guns found in various parts of a house: one at the foot of his bed, another in his bedroom closet, and two more in the upstairs occupant's bedroom. The defendant's girlfriend testified the gun in the bedroom closet was hers, but both she and the defendant denied ever seeing the gun at the foot of his bed. (*Id.* at pp. 593, 595.) The jurors were not instructed they must agree as to which one or more of the guns the defendant possessed, and the appellate course reversed for error. (*Id.* at pp. 595-596.) *Crawford* found the guns were separated in space and did not establish a continuous course of conduct because they were found in different parts of the house and the circumstances surrounding their possession were unique to each gun. (*Id.* at pp. 597-599.) Thus, jurors "might quite easily have been persuaded beyond a reasonable doubt that appellant possessed one gun, but not another." (*Id.* at p. 598.) Here, in contrast, there was no such danger or risk of jury confusion because the circumstances surrounding the possession of the PCP bottles were inextricably related. The consecutive hand-to-hand transactions the officers observed disclosed identical PCP bottles on Modica and Mapps in a quantity suitable for sale, indicating a continuous, coordinated act of possession in which Mapps held the PCP bottles with appellant's knowledge and under his control, to assist him in the sale to Modica. A unanimity instruction was not necessary because it was unlikely the jury would find appellant possessed one bottle, but not the other.

Unlike *King* and *Crawford*, there was no potential jury disagreement because the evidence did not suggest the bottle found on Mapps was the basis for a separate offense. (See *Maury, supra*, 30 Cal.4th at p. 423.) Appellant points out that Reynoso and Mapps presented conflicting testimony about who possessed the PCP bottle found on Mapps, and "the jury could have found that appellant possessed the drugs found on Modica but not the drugs found on Mapps and vice versa." According to appellant, those who believed Mapps' testimony that the PCP was for her personal use "could have found appellant guilty due to the PCP found on Derrick Modica, while those who disbelieved Mapps could have found appellant guilty due to the PCP found on

Mapps and not due to the PCP found on Modica.” Appellant’s reasoning is flawed. Those who did not believe Mapps and concluded she was lying to protect appellant – consistent with the prosecution’s theory of the case – would also have found appellant guilty of possessing the PCP found on Modica. And those who believed Mapps would not have found appellant guilty of any crime. (See *Bui, supra*, 192 Cal.App.4th at p. 1011.) The trial court below was not faced with the risk that “the jury may divide on two discrete crimes and not agree on any particular crime.” (*Russo, supra*, 25 Cal.4th at p. 1135.) The evidence supported the prosecution’s theory that appellant possessed PCP for sale to Modica, and Mapps assisted him by holding the PCP and the money received from the sale.

Appellant disputes that the evidence suggests one discrete crime, contending (1) the LAPD officers never observed any object exchanged during the hand-to-hand transactions, and (2) Mapps testified the drugs found on her belonged to her. However, an experienced narcotics officer’s observation of a hand-to-hand transaction, along with other circumstantial evidence, can strongly support a charge of possession for sale. (See, e.g., *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 756.) Furthermore, Mapps’ credibility was severely undermined during trial. She testified she and appellant parked in a remote corner of Food 4 Less in the middle of the night to collect rent money from Modica, though Modica was their tenant and lived in the same apartment. She admitted having cash in an amount roughly equivalent to the street value of the PCP found on Modica. Her testimony denying any exchange between appellant and Modica, and disclaiming any transaction with appellant, contradicted both officers’ testimonies. She testified the PCP hidden in her bra in a form and quantity designed for sale was for personal use, despite her previous statement to Reynoso that the PCP was appellant’s, and her own subsequent plea of guilty to possession for sale of a controlled substance. In returning its guilty verdict, the jury necessarily credited the officers’ testimony over Mapps’. That testimony indicated a sale to Modica of PCP held by Mapps for appellant, and appellant’s transfer of the drug money to Mapps – all within a matter of seconds. The bottles of PCP found on Modica and Mapps were not reasonably distinguishable in time and space, and the trial court was not required to give a unanimity instruction.

2. Any Error was Harmless.

Even where an unanimity instruction was required, it is settled that failure to give the instruction is “harmless when disagreement by the jury is not reasonably probable. [Citation.]” (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) Regardless of whether the bottle of PCP found on Mapps could have been charged as a separate offense, fundamental to this case was the jury’s determination of Mapps’ credibility. (See *People v. Turner* (1983) 145 Cal.App.3d 658, 681-682 [even if court erred by not providing unanimity instruction, jury’s determination that defendant was not credible supported continuous conduct exception and rendered any error harmless].) In light of Mapps’ undermined credibility, and the ample evidence establishing appellant’s continuous act of possession, it is not reasonably probable the jurors would have believed appellant possessed one unit of PCP for sale and not the other. Therefore, even had we concluded that the unanimity instruction should have been given, we would find the failure to do so harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. The Trial Court did not Err by Referencing Punishment During Jury Instructions.

Appellant also contends the trial court committed error by improperly referencing punishment during instructions on the prior convictions trial. We review allegedly erroneous jury instruction de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

1. Appellant Forfeited His Claim.

The failure to object or seek modification of jury instructions forfeits a challenge they were incorrect. (*People v. Bolin* (1998) 18 Cal.4th 297, 326.) Here, after the trial court finished instructing the jury with the language at issue, defense counsel did not object. Thus, appellant forfeited his argument that the trial court erred by improperly referencing punishment during jury instructions. Nevertheless, we address the merits of appellant’s argument.

2. The Instructions, as a Whole, Do Not Demonstrate Error.

“It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence. [Citations.]” (*People v. Allen*

(1973) 29 Cal.App.3d 932, 936.) Improper references to penalty or punishment are generally held reversible because they are irrelevant and misleading to the jury in determining guilt or innocence. (*Id.* at pp. 936-937.) Without such admonishment, “a jury may permit [its] consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment.” (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306.)

In considering a claim of instructional error, “[t]he test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant’s rights.” (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) We determine the correctness of the jury instructions from the entirety of the instructions, not from considering only parts of an instruction or one particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Further, we presume jurors are ““intelligent persons”” capable of understanding and correlating all instructions given to them. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

In the context of the entire jury instructions, we find no error by the trial court. Although the court digressed by alluding to sentencing “options” that would result from the jury’s findings, it did so in the context of expressly instructing the jury, multiple times, that its obligation was to make factual findings without consideration of punishment. The court’s vague allusion to sentencing “options” did not improperly taint the jury’s deliberations. Furthermore, the court’s statement that neither the main offense nor the prior convictions would “trigger what is known as the three strikes law” was not inaccurate because appellant had only one prior strike and was not subject to a third-strike sentence.³ The court’s statement was followed by a

³ Appellant cites to *People v. Nichols* (1997) 54 Cal.App.4th 21 (*Nichols*), to argue that the court’s reference to the three strikes law was reversible error. In *Nichols*, the trial court declined to answer the jury’s question whether the defendant was subject to the three strikes law, and admonished the jury not to consider punishment in its deliberations. (*Id.* at p. 23.) The appellate court affirmed, finding no error in the trial court’s decision and explaining that to hold otherwise “would in effect be ‘inviting’ the jury to exercise its power of jury nullification.” (*Id.* at p. 26.) *Nichols* does not support appellant’s position. The trial court below was not concerned with the power of jury nullification, and informed the jury that appellant was not

final admonition that the jury should make findings “based on the evidence.” Lastly, in light of the number of priors, it is likely the jury already knew its findings would impact the court’s sentencing options. On this record, it was not reasonably probable the jury misapplied the instructions in a manner prejudicial to appellant.

3. Any Error was Harmless.

Even had we found the trial court’s references to punishment during the prior convictions trial improper, we would deem the error harmless under the *Watson* standard. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836 [reversal required if it is “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”]; *People v. Aranda* (2012) 55 Cal.4th 342, 375 [error during jury instructions constitutes state law error subject to harmless error review under *Watson* standard]; *People v. Epps* (2001) 25 Cal.4th 19, 29 (*Epps*) [right to a jury trial on prior convictions is “purely a creature of state statutory law”].) As set forth above, in the context of the entire instructions, it was not reasonably probable the jury misapplied the court’s references to punishment in a manner prejudicial to appellant. Furthermore, the prior convictions were proven through official records from appellant’s prison packet admitted into evidence. Even if the judge erred in instructing the jury, the fact of the convictions was “presumptively established” by the records, and “the trial court’s error could not possibly have affected the result.” (*Epps*, *supra*, at p. 30.) It is improbable that the court’s brief allusion to sentencing “options” and its statement that appellant was not a third-strike offender would have improperly persuaded the jury to find the prior convictions true. In short, even had we found the trial court erred by improperly referencing punishment during trial on the prior convictions, any such error would be harmless.

subject to the three strikes law, which is more likely to remove a consideration of punishment from the jury’s deliberations. Also, consistent with *Nichols*’s holding, the trial court instructed the jury not to consider punishment in its deliberations.

4. Defense Counsel did not Render Ineffective Assistance.

We have concluded the trial court did not err by referencing punishment during jury instructions. Without error by the trial court, defense counsel could not have been expected to raise an objection, and was not ineffective for failing to do so. Accordingly, we conclude defense counsel did not render ineffective assistance.

In any event, to establish the ineffective assistance of counsel, appellant bears the burden of showing prejudice – that is, a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*People v. Centeno* (2014) 60 Cal.4th 659, 676, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.) For the reasons explained above, appellant cannot do so.

C. Remand is Necessary for the Trial Court to Strike One or Two Prior Prison Term Enhancements.

Appellant contends the case should be remanded to permit the trial court to strike the prior prison term enhancements related to his prior felony convictions reclassified as misdemeanors under Proposition 47.

In *People v. Buycks*, our Supreme Court held: “[S]ection 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), [prior prison term] enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47].”⁴ (*People v. Buycks* (2018) 5 Cal.5th 857, 890 (*Buycks*).)

As respondent concedes, *Buycks* requires the trial court to strike the prior prison term enhancements on the two prior offenses reclassified under Proposition 47 (the “first” and “fifth” priors). At sentencing, the trial court dismissed one of the five prior prison term enhancements, but did not specify which one. If the prior prison term enhancement already dismissed related to the two redesignated offenses, the trial court should strike the remaining prior prison term enhancement and reduce appellant’s sentence by one year. If the prior prison term enhancement already dismissed did not relate to the two redesignated offenses, the trial court should strike the corresponding

⁴ Section 1170.18, subdivision (k), provides in relevant part: “A felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes”

prior prison term enhancements and reduce appellant's sentence by two years.

DISPOSITION

We remand for the trial court to strike the prior prison term enhancements that correspond to appellant's redesignated prior offenses under Proposition 47. In all other respects, the judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.